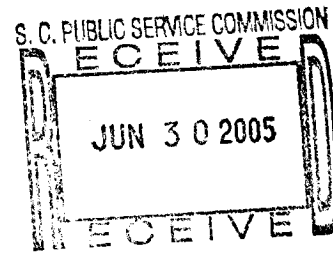


# ELLIS:LAWHORNE

John J. Pringle, Jr.  
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June 28, 2005



## VIA ELECTRONIC MAIL AND FIRST-CLASS MAIL SERVICE

The Honorable Charles L.A. Terreni  
Executive Director  
**South Carolina Public Service Commission**  
Post Office Drawer 11649  
Columbia, South Carolina 29211

RE: Joint Petition for Arbitration of NewSouth Communications, Corp.,  
NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III  
LLC, and Xspedius [Affiliates] of an Interconnection Agreement with  
BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the  
Communications Act of 1934, as Amended  
**Docket No. 2005-57-C, Our File No. 803-10208**

Dear Mr. Terreni:

Enclosed is the original and ten (10) copies of **Joint Petitioners' Rejoinder to BellSouth's Reply** for filing on behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius [Affiliates] in the above-referenced matter. By copy of this letter, I am serving all parties of record in this proceeding and enclose my certificate of service to that effect.

Please acknowledge your receipt of this document by file-stamping the copy of this letter enclosed, and returning it in the enclosed envelope.

If you have any questions or need additional information, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

John J. Pringle, Jr.

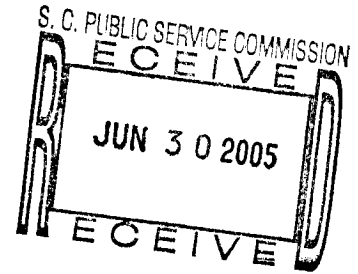
JJP/cr

cc: Office of Regulatory Staff  
all parties of record

Enclosures

**BEFORE THE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA**

**DOCKET NO. 2005-57-C**



IN RE:

Joint Petition for Arbitration on behalf  
of NewSouth Communications Corp.,  
NuVox Communications, Inc., and  
Xspedius [Affiliates] for an  
Interconnection Agreement with  
BellSouth Telecommunications, Inc.  
Pursuant to Section 252(b) of the  
Communications Act of 1934, as  
Amended.

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**JOINT PETITIONERS' REJOINDER TO  
BELLSOUTH'S REPLY**

Joint Petitioners hereby respond briefly to BellSouth's Reply. In order to prepare for the hearing on the Motion that will take place tomorrow morning, Joint Petitioners only touch briefly on the inadequacies of BellSouth's Reply, and will more fully address these issues at the hearing. Suffice it is to say that BellSouth still has not cited to any authority whatsoever for the proposition that Mr. Russell's testimony should or could be excluded from the record in this case.

BellSouth attempts to blur the clear line that exists between attorneys who represent and advocate, and witnesses. Coming up with a hypothetical not remotely similar to the current case (as BellSouth does in its Introduction) doesn't change this. Further, Joint Petitioners are not claiming that the Rules of Professional Conduct don't apply to Mr. Russell. Merely that a conflict (or other violation of those Rules) has not occurred in this Docket.

With respect to BellSouth's attachment of Mr. Russell's deposition, note that BellSouth *took Mr. Russell's deposition* -- something it could not do if Mr. Russell were an attorney of record in this case. In order to glean the full context of the deposition discussion cited by BellSouth, it is necessary to read the next sentence in the deposition, on lines 6-8:

Q: Are you appearing as a lawyer today?

A: Appearing as a witness. I am also a lawyer by trade.

Thus, BellSouth was made aware long before this hearing of Mr. Russell's role in this Docket (and every arbitration proceeding at which he testified).

The Model Opinion cited by BellSouth does not apply here, and in fact addressed a part of the Rules of Professional Responsibility that BellSouth has not alleged Mr. Russell has violated. The Motion to Strike alleges that Mr. Russell had a conflict in violation of Rule 1.7(a) of the South Carolina Rules of Professional Conduct. Motion to Strike at Page 4. The Model Opinion, however, construes Rule 1.7(b) of the Model Rules of Professional Conduct, and never mentions or cites Rule 1.7(a). Therefore, the Model Opinion is not "secondary authority" for the allegations in the Motion to Strike.

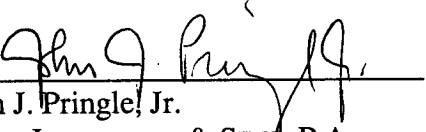
Moreover, the Model Opinion doesn't apply to the facts of this case. Counsel for Joint Petitioners will take the Hearing Officer through the entire opinion at the hearing and point out what the document does and does not say. For purposes of this response, it is important to point out that BellSouth alleges for the first time in its Reply that Mr. Russell enjoyed an "attorney-client" relationship with NuVox. Also, no part of the Model Opinion requires or suggests that a witness not be allowed to testify, much less that his testimony that has already become evidence of record be excluded.

A number of the cases cited by BellSouth (*e.g. Cal West Nurseries, American Airlines, Commonwealth*) involve the construction and application of the Rules of Professional Conduct (or some analogue thereof) that are in effect in another states, and therefore involve law that is not applicable here. However, even on the facts and circumstances involved therein these cases are either distinguishable and/or actually make the Joint Petitioners arguments for them. The *American Airlines* case involves different facts, different law, and confidentiality considerations that are not applicable here. The *Commonwealth* case, on the other hand, supports the Joint Petitioners position. *Cal West Nurseries*, as with so many other cases cited by BellSouth, goes only to disqualification of attorney representation, not witness testimony exclusion.

BellSouth still has not cited or attempted to show the “unfair prejudice” that would support exclusion of Mr. Russell’s testimony under Rule 403 of the South Carolina Rules of Evidence. BellSouth now cites to the *Gregory* case for the proposition that prejudice need not be shown at all (another departure from its Motion). *Gregory* is not applicable to witness testimony (and does not cite to the Rules of Evidence for its decision), but applies when an attorney representing a criminal defendant has an actual conflict because he also represents the Solicitor’s Office in another case. It makes sense that an attorney who represents an Assistant Solicitor in a divorce action has a conflict when defending an action brought by the Solicitor. *Gregory* did not strike any witness testimony, and in fact ruled that an attorney should have been disqualified from representation (not a witness appearance). As counsel will explain at the hearing, *Gregory* turned on an attorney’s being “tempted to dampen the ardor of his defense” and a “situation inherently conducive to divided loyalties,” neither of which is present – or alleged—here.

WHEREFORE, the Joint Petitioners respectfully renew their request that the Hearing Officer deny BellSouth's Motion to Strike, and grant such other relief as is just and proper.

Respectfully submitted,

By:   
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Attorneys for the Joint Petitioners

Columbia, South Carolina  
June 28, 2005

**BEFORE THE  
SOUTH CAROLINA PUBLIC SERVICE COMMISSION  
DOCKET NO. 2005-57-C**

In the Matter of	)	
	)	
Joint Petition for Arbitration of	)	
NewSouth Communications, Corp.,	)	
NuVox Communications, Inc.,	)	
KMC Telecom V, Inc.,	)	CERTIFICATE OF SERVICE
KMC Telecom III LLC, and	)	
Xspedius [Affiliates] of an	)	
Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934,	)	
as Amended	)	

This is to certify that I have caused to be served this day, one (1) copy of the **Joint Petitioners' Rejoinder to BellSouth's Reply** by placing a copy of same of same in the care and custody of the United States Postal Service with proper first-class postage affixed hereto (and by electronic mail service), and addressed as follows:

Patrick Turner, Esquire  
**BellSouth Telecommunications, Inc.**  
P.O. Box 752  
Columbia SC 29202

Office of Regulatory Staff  
Legal Department  
PO Box 11263  
Columbia SC 29211

  
\_\_\_\_\_  
Carol Roof

June 28, 2005

Columbia, South Carolina

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